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In The Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* OF THE STATES OF COLORADO AND NEW MEXICO IN SUPPORT OF PETITIONER

KEN SALAZAR, Attorney General*
ALAN J. GILBERT, Solicitor General
FELICITY HANNAY, Deputy Attorney General
ANTHONY S. TRUMBLY, Senior Assistant Attorney General
State of Colorado
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
(303) 866-3557
(303) 866-3558 (fax)

**Counsel of Record for all Amici*

PATRICIA A. MADRID, Attorney General
GLENN R. SMITH, Deputy Attorney General
STEPHEN R. FARRIS, Assistant Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6010
(505) 827-4440 (fax)

[Additional Amici Listed on Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MARK J. BENNETT
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

LAWRENCE WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

JON BRUNING
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

BRIAN SANDOVAL
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701-4717

WAYNE STENEHJEM
Attorney General
State of North Dakota
600 East Boulevard Avenue
Bismarck, ND 58505-0040

LAWRENCE E. LONG
Attorney General
State of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

GREG ABBOTT
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711-2548

MARK L. SHURTLEFF
Attorney General
State of Utah
236 State Capitol
Salt Lake City, UT
84114-0810

PATRICK J. CRANK
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, WY 82202

BEST AVAILABLE COPY

QUESTION PRESENTED

Does the mere diversion and delivery, from one stream or water body to another, of water that contains pollutants require a National Pollutant Discharge Elimination System permit under the federal Clean Water Act, 33 U.S.C. §§ 1251-1387?

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INTEREST OF *AMICI CURIAE*

Amici curiae, the Attorneys General of Colorado and New Mexico, joined by other states listed on the inside cover of this brief, submit this brief in support of Petitioner South Florida Water Management District seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 280 F.3d 1364 (CA11 2002) ("*Miccosukee*").[1]

The Eleventh Circuit decision would impose permitting requirements on the simple diversion and delivery of water in an unaltered condition from one basin to another basin. These requirements would interfere with the states' ability to meet the needs of their residents and to meet their obligations under interstate water compacts. In addition, the decision would impair individual water rights as a water right owner could be forced to give up or reduce water diversions or construct prohibitively expensive treatment facilities in order to meet these permitting requirements.

All fifty states allocate the waters within their boundaries for "beneficial" or "reasonable" use under one of two prevailing legal doctrines. The arid western states generally follow the prior appropriation doctrine whereas other states use the riparian doctrine. The holding of the Eleventh Circuit would substantially and inappropriately

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[1] The eighteen member states of the Western States Water Council recently adopted, by a vote of fifteen with three abstentions, a resolution opposing a requirement that transbasin diversions/deliveries obtain a discharge permit unless the purpose of the diversion/delivery is waste disposal.

interfere with the operation of state water laws established under both doctrines.

West of the 100th Meridian, the nation is generally arid; that is, it receives less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture. Unfortunately, the timing and location of precipitation do not correlate well with on-the-ground demands. Hence, it is necessary to divert and deliver water through a complex system of manmade and natural conveyances and reservoirs that operate under some form of the prior appropriation system. This allows the West to sustain its cities, farms and ranches. Without this system, many nationally important agricultural regions could not support crops, including Weld and Larimer Counties in Colorado, the Central and Imperial Valleys of California, the Snake River Valley of Idaho and the Yakima Valley of Washington. Without this system, many of the West's great cities, including Albuquerque, Denver, Las Vegas, Los Angeles, Phoenix, San Francisco and Salt Lake City, simply would not have flourished.

In Colorado, forty-nine major transbasin diversions/deliveries move an average of 550,000 acre feet per year of water ("af/year") to supplement supplies in other basins. Transbasin diversions/deliveries include the Colorado-Big Thompson/Windy Gap Projects, which deliver nearly 280,000 af/year to supplement the water supplies of thirty cities and towns and over 600,000 acres of farmland. Colorado Springs employs six transbasin diversions/deliveries to move 75,000 af/year, eighty percent of its total supply, to city residents. Denver similarly moves over 200,000 af/year through two transmountain tunnels to meet nearly half the city's needs. Sixty percent of Coloradans depend on transbasin diversions/deliveries for at least

part of their domestic supplies. In addition, over fifty percent of Colorado's irrigated farmland relies on transbasin diversions/deliveries. To date, none of these facilities has been subjected to National Pollutant Discharge Elimination System ("NPDES") permitting.[2]

Under the "but for" test of *Miccosukee*, at each point where a ditch, canal, tunnel or pipeline delivers its water to a stream or reservoir, a permit, including terms and conditions, would be required if the water would not have reached that point "but for" man's action.[3] For example, the Fort Lyon Canal in the Arkansas River Basin, Colorado's driest watershed, carries water from the Arkansas River and two reservoirs for 113 miles almost to the Kansas State Line. It serves 93,000 acres of irrigated farmland, in the process crossing or flowing through seven creeks and arroyos and two reservoirs. The Eleventh Circuit's opinion would require the Canal's operator to obtain as many as nine permits. The water of the Arkansas River is high in total dissolved solids, so the Canal's operator might have to build one or more water treatment

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[2] Colorado has at least several hundred transbasin diversions/deliveries in the state that could require permits under the holding of *Miccosukee*. The water quality of Colorado's streams and lakes is generally excellent without the imposition of NPDES permits on transbasin deliveries. Of its 107,403 miles of streams, only 4,964 (4.6%) are designated as "impaired," not meeting water quality standards or designated uses, under the Clean Water Act, 33 U.S.C. § 1313. There is no evidence that transbasin diversions/deliveries are the cause of any of these impairments.

[3] "[F]or an addition of pollutants to be from a point source, the relevant inquiry is whether – but for the point source – the pollutants would have been added to the receiving body of water." *Miccosukee*, 280 F.3d at 1368.

plants in order to meet NPDES permit requirements. This is neither financially nor technically feasible for canal shareholders, many of whom are economically-depressed farmers and ranchers.

In New Mexico, the San Juan-Chama Project diverts 90,500 af/year on average from the Colorado River Basin through transmountain tunnels to the Rio Grande Basin. The Project provides water to the cities of Albuquerque and Santa Fe, to farmers in the Middle Rio Grande Conservancy District, and to Indian Tribes and Pueblos. By offsetting depletions in the Rio Grande Basin, the San Juan-Chama Project water allows New Mexico to make full use of its allotment under the Rio Grande Compact. In the absence of the San Juan-Chama Project, the City of Albuquerque would be forced to rely upon pumping from non-renewable aquifers for its municipal supplies, other cities and Pueblos would be left critically short of a supply, and thousands of acres of farmland in the Middle Rio Grande valley would lose their irrigation supply. In times of severe drought like 2002-2003, imported water from the San Juan-Chama Project provides much of the water in storage in the Middle Rio Grande valley in New Mexico.

In Arizona, the Central Arizona Project moves 1.5 million af/year from the Colorado River Basin to supplement dwindling groundwater supplies in the Phoenix and Tucson areas. In the upper Colorado River Basin, at least thirty-six major transbasin diversions/deliveries move 700,000 af/year of Colorado River water into other basins in Colorado, New Mexico, Utah and Wyoming.

California's State Water Project is the largest transbasin transfer in the country, delivering up to 4.7 million af/year through the San Francisco Bay Delta to provide

supplemental water to twenty million Californians and 660,000 acres of irrigated farmland. The Bureau of Reclamation's Central Valley Project similarly delivers about 7.3 million af/year to irrigate 2.6 million acres and for urban and wildlife uses. In addition, diversions/deliveries from the Colorado River to Southern California for irrigation and municipal use total 4.5 to 5.2 million af/year.

SUMMARY OF ARGUMENT

The economic and social well-being of the West and the nation depend on the ability to divert and move water resources pursuant to state law. At risk as a result of the Eleventh Circuit decision is the continued ability to divert freely water from one basin for delivery in another basin in order to meet municipal, agricultural and industrial demands.

The Eleventh Circuit decision in *Miccosukee* would impose discharge permit requirements under the Clean Water Act on transbasin diversions/deliveries. Such permit requirements would interfere with the states' ability to allocate their waters to meet the needs of their citizens and to comply with interstate compacts. Water diverters would face losing the use of some or all of their water rights in order to meet permit requirements.

This interference in state water law is contrary to the deference historically shown by Congress and this Court to the states in matters of water allocation and use. The Clean Water Act clearly expresses Congress's intent to honor long-standing federal deference to state water law. It certainly lacks any "clear statement" that Congress intended to alter this established federal-state framework.

In the Clean Water Act, Congress appropriately deferred to the states to protect water quality while allocating water resources to meet the needs of their citizens. The states are well equipped to perform this task under state law.

ARGUMENT

I. The Eleventh Circuit's Opinion is Contrary to the Plain Language of the Clean Water Act and Congress's Intent to Defer to the States' Allocation of Water.

Congress expressed its clear intent to honor state water allocation law in the plain language of the Clean Water Act ("Act"), as confirmed by the Act's legislative history. The holding in *Miccosukee* directly conflicts with the language in the Act and Congress's intent.

A. Congress Expressly Rejected Interference with State Water Law.

Land and water use decisions are traditionally and primarily state prerogatives. *See Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). As the Court reiterated in *SWANCC*, where a statutory interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power," Congress must clearly convey its intent. *Id.* at 173. *See also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Requiring NPDES permits for the simple movement of water from one basin to another would intrude upon matters

that are "subject to the plenary control of the designated states . . . ." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164 (1935). Under the Eleventh Circuit opinion, this unwarranted intrusion on state sovereignty occurs in the face of a clear directive from Congress that it intended to respect the ability of states to control and manage their water resources.[4]

The opening provision of the Clean Water Act clearly demonstrates Congress's intent to preserve the historical federal-state balance concerning the allocation of water.

> *Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, *to plan the development and use* (including restoration, preservation, and enhancement) *of land and water resources*, and to consult with the Administrator in the exercise of his authority under this chapter."

SWANCC, 531 U.S. at 166-67 (quoting 33 U.S.C. § 1251(b)) (emphasis added). Congress did not intend to interfere with state water law or allocations.[5] The Eleventh Circuit decision is in derogation of that congressional directive.

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[4] It cannot be forgotten that the owners and operators of the water systems are not adding pollutants to any water diverted/delivered; they are simply moving unaltered water from one water body to another.

[5] States, in the exercise of state law, *may* require transbasin diversions to be permitted, but the states should not be required to do so.

B. Section 101(g) of the Clean Water Act Expresses a Clear Intent to Protect State Water Allocations.

Congress adopted section 101(g) as part of its 1977 amendments to the Clean Water Act:

> It is the policy of Congress that *the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired* by this chapter. It is the further policy of Congress that *nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State*. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g) (emphasis added). In plain language Congress declared that the authority of each state to allocate quantities of water will not be impaired by the Act. Congress did not stop there. Congress took another step and pledged that nothing in the Act will be construed to abrogate water rights established by any state. Rather, to the extent water quality concerns arise in the context of water allocation decisions, the federal government is to cooperate with the states in developing appropriate solutions outside of the regulatory directives of the point source permit program.[6]

[6] *See* Petitioner's brief for an explanation of the section 402 NPDES point source permitting program.

In adopting section 101(g), Congress built upon language in 1972 Amendments to the Act that already recognized federal deference to the states.

> It is the policy of Congress to recognize, preserve, and *protect the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, *to plan the development and use* (including restoration, preservation, and enhancement) *of land and water resources*, and to consult with the Administrator in the exercise of his authority under the chapter.

33 U.S.C. § 1251(b) (emphasis added). Similarly, section 510 of the 1972 Amendments declared "[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting *any right or jurisdiction of the States with respect to the waters* (including boundary waters) of such States." 33 U.S.C. § 1370 (emphasis added). Thus, as it refined the Act over the years Congress progressively reinforced federal deference to state water law and allocations made thereunder. Requiring discharge permits for the simple conveyance of water directly conflicts with Congress's plain language.

C. The Legislative History of Section 101(g) Confirms Congress's Intent to Refrain From Interfering with State Water Law and Allocations.

The legislative history of section 101(g) of the Act expressly confirms Congress's intent to reaffirm the longstanding tradition of federal deference to state

jurisdiction over water use decisions. The Senate adopted the Wallop/Hart amendment[7] in response to suggestions that reducing water diversions/deliveries under state water law might be necessary to solve water quality problems.[8] The Conference Committee, which included Senators Malcolm Wallop and Gary Hart, made minor changes to the language of the amendment and added it to the legislative declaration, explaining:

> [I]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction should not be superseded, abrogated or otherwise impaired by this Act . . . . [and] that nothing in this Act should be construed to supersede or abrogate rights to quantities of water that have been established by any State.

[7] During the Senate debate, Senator Malcolm Wallop explained the purpose of the Wallop/Hart provision. "The amendment simply states that nothing in the act shall be construed to supersede or abrogate or in any other way, affect any authority now vested in any State to establish or operate programs for the allocation of quantities of water within its respective boundaries, or any rights to or allocations of quantities of water which have been established pursuant to such program." S. DEB.: August 4, 1977, *reprinted in* 1977 LEGISLATIVE HISTORY at 1030.

[8] The amendment was prompted by concerns over proposals contained in "the Issue and Option Papers for the Water Resource Policy Study . . . conducted by the Water Resource Council," released three weeks earlier. 42 Fed. Reg. 36,788 (July 15, 1977). Several provisions in the Water Resource Council's Issue Paper ("WRC Paper") threatened the integrity of the states' water allocation laws. For example, the WRC Paper concluded that *reducing water diversions/deliveries* under state water rights might be necessary to solve water quality problems. *Id.* at 36,793. The WRC Paper even proposed withholding federal contributions to state pollution control programs unless a state changed its water allocation law to manage water rights for federal water quality purposes. *Id.*

H.R. CONF. REP. No. 95-830 at 52 (1977), *reprinted in* 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 at 236 (1978) (hereinafter "1977 LEGISLATIVE HISTORY").

Senator Wallop explained the Conference Substitute in similar terms on the Senate floor:

> The conferees accepted an amendment which will reassure the State [sic] that *it is the policy of Congress that the Clean Water Act will not be used for the purpose of interfering with State water rights systems.*
>
> * * *
>
> The amendment simply states that *it is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this act. It also states that it is the further policy of Congress that nothing in this act will be construed for the purpose of superseding or abrogating rights to quantities of water which have been established by a State.*

S. DEB.: Dec. 15, 1977, *reprinted in* 1977 LEGISLATIVE HISTORY at 531 (emphasis added).

The legislative history of section 101(g) clearly confirms that Congress intended to leave historical deference to state water law undisturbed, while recognizing a more general federal role in protecting water quality. Where water quality and quantity concerns intersect, the state's authority over quantity is to remain inviolate.

II. Requiring NPDES Permits for Transbasin Diversions Would Interfere with the States' Water Allocation Laws.

The Eleventh Circuit decision interferes with fundamental aspects of the appropriation doctrine of beneficial

use because requiring NPDES permits for simple trans-basin diversions/deliveries would supersede (reduce) state-established quantitative limits on water rights. Permit conditions that prevent the physical conveyance and use of some or all of the water legally available under individual water rights allocated under state law would directly abrogate state water allocations. Such federal interference has important implications, not only for individual water rights, but also for comity among the states under interstate compacts and equitable apportionments and for the maximum utilization of scarce water resources.

A. The Supreme Court and Congress Have Long Deferred to the States' Water Allocation Laws, Beginning with the Equal Footing Doctrine.

In the complicated field of federal-state relationships, the Supreme Court and Congress have spoken with a clear and consistent voice regarding the allocation of water. As the Court observed in its landmark decision in *California v. United States*, 438 U.S. 645, 653 (1978):

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

Federal deference to state water allocation law began with the "equal footing" doctrine. Under that doctrine, Congress granted the Western states, upon their admission into the Union, sovereignty over the unappropriated waters in their streams. *See Kansas v. Colorado*, 206 U.S. 46, 94 (1907);[9] *Fox River Paper Co. v. R.R. Comm'n of Wisconsin*, 274 U.S. 651, 655 (1927).

Congress reaffirmed its deference to states' water allocation laws when it passed the Desert Land Act of 1877, ch. 107, 19 Stat. 377 (1877). *See also* Mining Act of 1866, *codified at* 43 U.S.C. § 661; Mining Act of 1870, 16 Stat. 218, *codified at* 30 U.S.C. §§ 51, 52; *California Oregon Power Co.*, 295 U.S. 142 (The Desert Land Act effected a severance of all waters upon the public domain and reserved such water for use under the laws of the states). Congress repeatedly reaffirmed federal deference to state water law when it ratified western states' constitutions in their acts of admission.[10] The federal Reclamation Act of 1902 ("Reclamation Act") similarly affirmed this principle. 32 Stat. 388 (1902), *codified at* 43 U.S.C. § 383.[11]

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[9] In *Kansas v. Colorado*, Kansas argued that Congress had expressly applied English common law to both states and that the common law included the riparian system of water rights. The Court rejected this view and held "[each state] may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State." 206 U.S. at 94.

[10] For example, the WYO. CONST., art. VIII, § 1 states "[t]he water of all natural streams, springs, lakes or other collections of still water . . . are hereby declared to be the property of the state." *See* Act to provide for the Admission of the State of Wyoming into the Union, ch. 664, 26 Stat. 222 (1890). N.M. CONST., art. XVI, § 2, provides "[t]he unappropriated water of every natural stream . . . is hereby declared to belong to the public and to be subject to appropriation for beneficial use." *See* Joint Resolution to Admit the Territories of N.M. and Ariz. as states into the Union, Pub. Res. 8, 37 Stat. 39 (1911).

[11] The Act authorized the federal government to construct water resource development projects. However, section eight of the 1902 Act specifically provided that:

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In 1978, the Court cemented federal deference to state water law in the case of *California v. United States*, 438 U.S. 645. In that case, the United States challenged California's authority to impose conditions on the operation of New Melones Reservoir, a federal reclamation facility. The Court rejected the United States' arguments and concluded that section eight of the federal Reclamation Act required the federal government "to comply with state [water] law in the 'control, appropriation, use, or distribution of water.'" *California v. United States*, 438 U.S. at 675. In reaching this conclusion, the Court relied upon its earlier decisions. "[E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters." *Id.* at 662 (citing *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899).

It is important to note that the Court also made it clear that federal deference is not unique to the West, but applies nationally.

> [A]rid lands are to be found mainly, if not only[,] in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen.

Id. at 655 (quoting *Kansas v. Colorado*, 206 U.S. at 92).

Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

43 U.S.C. § 383.

B. Requiring NPDES Permits for Transbasin Diversions/Deliveries Would Abrogate Water Allocations Because Diverters Would Have to Forgo the Full Exercise of Their Water Rights to Comply with Permit Conditions.

Under the Eleventh Circuit opinion, many diverters would have no alternative but to curtail their diversions/deliveries to meet NPDES permitting conditions. If a discharge merely has "the potential to cause . . . an excursion above any State water quality standard," its NPDES permit must contain conditions to control all contributing pollutants. 40 C.F.R. § 122.44(d)(1)(i) (2002). Thus, an NPDES permit required under *Miccosukee* would necessarily contain conditions that would limit the amount of pollutants delivered to the receiving water body. Transbasin diversions/deliveries in the West generally peak during spring snow melt when the most water is available, and levels of total suspended dissolved solids are commonly elevated.[12]

To avoid the potential to cause an excursion above the water quality standards of the receiving water body during spring runoff, a transbasin diverter might have to expend millions of dollars to construct a treatment facility or implement so-called best management practices in an

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[12] Up to eighty percent of the precipitation in Colorado falls as snow, for example.

attempt to reduce the presence of even natural pollutants.[13] The facility would be required to treat peak diversions, which might occur only one or two days a year, in order to protect the water quality of the receiving water body,[14] while sitting idle for most of the year.[15]

As an alternative to sizing a treatment plant to accommodate maximum diversions/deliveries, a diverter could attempt to construct a surge reservoir in order to feed water at a constant rate into the treatment facility. Given the location of many such diversions on federal lands in high mountain areas and the volume of water involved, neither approach may be economically, technically or politically feasible.[16] In addition, such new

[13] Thunderstorms create similar problems. In addition, most water conveyances in the West are open ditches and canals and are directly impacted by runoff.

[14] For example, the Colorado-Big Thompson Project delivers transbasin water at rates up to 1,293 million gallons per day (MGD), four times the capacity of the largest existing treatment plant in Colorado. Average diversions are 220,000 af/year, or 203 MGD. Thus, the treatment plant might have to be sized to meet peaking flows of 425 percent of average. Similarly, the San Juan-Chama Project in New Mexico has a capacity to divert up to 614 MGD, 750 percent of the average diversions, 81 MGD. The California State Water Project diverted 5.2 million af in 1997 from the San Francisco Delta, or an average of 4,642 MGD. For comparison, the Metropolitan Water District of Southern California, the largest municipal water provider in the United States, delivers an average of 1,700 MGD of raw and treated water, about a third of the Delta transbasin diversions.

[15] Fifty percent of Colorado's mountain streamflows occurs in just three months: May, June and July.

[16] Many transbasin conveyances are located on federal land, including national parks and national forests adjacent to wilderness areas. Permitting a treatment facility and/or surge reservoir would

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construction would have its own environmental consequences. Instead, diverters would have no alternative but to curtail diversions/deliveries to meet NPDES permit conditions, effectively relinquishing a part of their state-allocated water right.[17]

invoke the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f, which can be costly and time consuming.

[17] In addition, if the transbasin movement of water containing natural pollutants is held to require a permit under section 402, such water movement would also be subject to the total maximum daily load (TMDL) provisions of section 303(d) for "areas with insufficient controls" ("impaired" waters). 33 U.S.C. § 1313(d). A TMDL defines the specified maximum amount of each pollutant that can be discharged ("loaded") into the water from all combined sources without exceeding water quality standards. 40 C.F.R. § 130.7 (2002). The TMDL is allocated among point and nonpoint sources so that water quality standards can be achieved. Each point source receives a specific waste load allocation, which is implemented through section 402 discharge permits. *Id.* In many cases, the only practical way for transbasin diverters to curtail pollutant loadings would be to reduce diversions/deliveries because they could not satisfy waste load allocations without costly storage or treatment. As a result, they would have to forgo full use of their state water rights.

Where the quality of waters "exceed[s] levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water," antidegradation provisions apply to maintain and protect existing uses. 40 C.F.R. § 131.12(2) (2002). Discharges cannot lower existing water quality absent a "necessity" determination, which would include an alternatives analysis. (A state may allow degradation if it finds that "allowing lower water quality is necessary to accommodate important economic or social development in the areas in which the waters are located." 40 C.F.R. § 131.12(a)(2) (2002). Although transbasin water is often suitable for beneficial use without treatment, transbasin deliveries would be subject to this requirement under the Eleventh Circuit's holding. *Id.* Similar to deliveries to impaired waters, the only practical way for many transbasin diverters to meet antidegradation requirements for high quality waters would be to curtail

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C. Requiring NPDES Permits for Transbasin Diversions/Deliveries Would Interfere with the Maximum Utilization of the States' Water Resources.

As evidenced by the devastating drought and accompanying fires of the past few years in the western United States, there is a pressing need to maximize the use of scarce water resources. Maximum utilization of water resources is enhanced by innovative state programs, such as dry-year transfers of water from agricultural to urban use, conjunctive (cooperative) use of surface and groundwater, and aquifer recharge.[18] States and water users also regularly bank, exchange and augment their water supplies, and even reclaim and reuse wastewater. Each of these strategies employs water that is under-utilized or that would otherwise be wasted and turns it into a valuable asset to meet agricultural, municipal and industrial water needs.[19] In many western states, however,

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diversions/deliveries, forgoing the use of a portion of their state water right.

[18] *See, e.g., Fellhauer v. People*, 167 Colo. 320, 336, 447 P.2d 986, 994 (1968) ("As administration of water approaches its second century the curtain is opening upon the new drama of *Maximum utilization*") (emphasis added); *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (CA10 1981) [quoting *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 417, 467 P.2d 986, 989 (1970) ("utilization [of water] for maximum benefits is a requirement second to none, not only for progress but for survival"), and concluding that "[m]aximum utilization then is a fundamental requirement which prevents waste of water.")

[19] An extensively used strategy in Colorado for improving water system efficiency and yield is exchanges, which are a legal and engineering approach for minimizing capital, transmission, and/or treatment costs. In an exchange, a water user is allowed to take water from a new location on the stream or a different source, such as another tributary, but only if the water is replaced elsewhere and in a manner

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such water supply innovations are available only as a direct consequence of the ability to transport water utilizing natural watercourses from a basin with an excess to a basin with a shortage.[20] Requiring an NPDES

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that ensures no injury to other water rights. *See* COLO. REV. STAT. §§ 37-80-120, 37-83-104 (2003). The City of Denver relies on exchanges to supply its customers reliably and efficiently.

California began utilizing large-scale water transfers involving the State Water Project to ameliorate drought in 1991. In addition, conjunctive use of surface and ground water, the storage of surface supplies in times of plenty in underground aquifers for subsequent withdrawal and use, is the basis of the Kern Water Bank, another drought-management strategy. *See Planning and Conservation League v. Dep't of Water Resources*, 83 Cal. App. 4th 892, 100 Cal. Rptr.2d 173 (2000).

[20] For example, California Courts have consistently concluded that the realities of western water development require that those who develop surface water supplies be allowed to use natural channels to convey and deliver these supplies where they are needed. As early as 1857, the California Supreme Court noted:

> It would be a harsh rule, however, to require those engaged in these enterprises to construct an actual ditch along the whole route through which the waters were carried, and to refuse them the economy that nature occasionally afforded in the shape of a dry ravine, gulch, or cañon.

Hoffman v. Stone, 7 Cal. 46 (1857).

The California Supreme Court noted the importance of this rule (codified in CALIFORNIA WATER CODE § 7075 (2002)) in reviewing the propriety of Los Angeles' water distribution system:

> By availing itself of these natural reservoirs, it spared its citizens the cost of financing the construction of additional dams, if, indeed, appropriate sites were available at the lower end of the aqueduct. Early in the history of the state, this court recognized the advantage of permitting the use of natural surface facilities, stream beds, dry canyons and the like, for the transportation of water . . . .

City of Los Angeles v. City of Glendale, 23 Cal.2d 68, 76-77 (1943) [citations omitted].

permit and accompanying controls on each transbasin diversion would stifle these critical water management initiatives, since permit requirements would stand in the way of simply moving the water from one basin or subbasin to another. For example, even if the construction of a new treatment facility were not required, it may be impossible to obtain an NPDES permit in time to allow a new transbasin delivery to address a drought emergency in another basin.[21] Similarly, a time-consuming permitting process would curtail the use of "water banks" as a mechanism to effectuate such water transfers.[22]

D. Requiring NPDES Permits for Transbasin Diversions/Deliveries Would Interfere with Interstate Water Allocations.

A significant number of transbasin water diversions/deliveries occur on interstate stream systems, the waters of which have been allocated among the states by interstate compact or Supreme Court decree.[23] Requiring

[21] The minimum time between submission of an application and issuance of a permit is 210 days, not including time to prepare the application or time for the permitting agency to review the application and write the permit. *See* 40 C.F.R. § 122.21(c) (permit application shall be submitted 180 days before discharge), 124.10(b) (30 day public comment period), 124.15(a) and (b) (permit effective 30 days after agency decision unless no comments requested changes), 123.25 (2002). In contrast, Colorado can immediately approve an emergency water transfer under state law. COLO. REV. STAT. § 37-92-308(7) (2002).

[22] A water bank is a formal mechanism for pooling water for rental to other users.

[23] *See, e.g.*, Colorado River Compact, 42 Stat. 171 (1921) (Ariz., Cal., Colo., Nev., N.M., Utah, Wyo.); Rio Grande River Compact, 53

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permits under the Clean Water Act for these water transfers would pose significant problems for such interstate allocations.

States may not be able to fully utilize their compact entitlements if technically or economically impossible NPDES permit conditions prevent transbasin deliveries of surplus water to other basins with unmet demands.[24] For example, Colorado uses much of its surplus Colorado River Compact entitlement to meet needs in the water-short South Platte River and Arkansas River Basins. Similarly, New Mexico uses much of its Colorado River entitlement in the Rio Grande Basin, and Arizona uses most of its Colorado River entitlement in the Gila River and Salt River Basins. California also uses much of its Colorado River Compact water outside the basin in order to serve municipalities along its southern coast.

Transbasin diversions/deliveries can also be a significant source of waters necessary to mitigate the impact of excess "native water" diversions in the receiving basin. In other words, return flows from transbasin diversions/deliveries; i.e., imported waters, can be an essential part of the supply a state uses to meet interstate obligations to downstream states. New Mexico indirectly relies on transbasin deliveries from the Colorado River Basin (through exchange) to satisfy native Rio Grande water rights, leaving Rio Grande water to meet compact obligations to Texas from the Colorado River Basin. In the

Stat. 785 (1939) (Colo., N.M., Tex.); *Arizona v. California*, 373 U.S. 546 (1963) (allocating the lower Colo. River among Ariz., Cal. and Nev.).

[24] *See* II.B.

severe drought of 2003, New Mexico would have been forbidden from storing water in the Rio Grande Basin if water from transbasin diversions/deliveries had not been available, leaving cities such as Santa Fe with a critically short supply.[25]

III. States Can and Do Appropriately Address Water Quality Impacts from the Diversion/ Delivery of Water.

State control over the use of water resources represents sound public policy, according to the D.C. Circuit. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 182 (CADC 1982). Water quality impacts associated with dams and diversions "may not be amenable to the nationally uniform controls contemplated by § 402 because pollution problems are highly site-specific . . . ." *Id.* at 177, n. 62.

States have established laws to appropriately protect water quality while allocating water resources to meet the needs of their citizens. These laws explain why there is no evidence that the historic absence of NPDES permitting requirements on transbasin diversions/deliveries causes significant water quality problems, and why reversing the Eleventh Circuit decision would not lead to adverse water quality impacts.

[25] Since there were less than 400,000 af of usable water in storage in the Rio Grande Project by the end of 2002, the Rio Grande Compact prohibited New Mexico from storing water for the benefit of Texas in reservoirs constructed after 1929. Rio Grande Compact, art. 7, 53 Stat. 785 (1939). All the reservoirs above Elephant Butte in New Mexico were constructed after 1929.

A. State "Water Quantity Law" Permits the Conveyance of Water for Beneficial Uses But Not for Waste Disposal.

The states have adopted one or both of two overlapping doctrines for the allocation of water for use. The western states generally follow the prior appropriation doctrine.[26] The riparian doctrine is prevalent in the East.

In prior appropriation states, water may be diverted only for beneficial use. *Atchison v. Peterson*, 87 U.S. 507, 514 (1874). "*Beneficial use* is 'a restrictive concept of valid water uses in the water law of the arid western states requiring that water only be *used for purposes that are beneficial to the user and to society in general, such as irrigation and municipal uses.*'" *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1132 n. 33 (CA10 2003) (emphasis added). "[O]n the point of what is beneficial use the law is 'general and without significant dissent.'" *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (CA9 1983).[27]

[26] The prior appropriation doctrine is generally followed west of the 100th Meridian, where natural precipitation is inadequate for crop production; i.e., Alaska, Arizona, Colorado, Idaho, Montana, Nebraska, New Mexico, Utah and Wyoming. California, Kansas, Mississippi, Nebraska, North Dakota, Oregon, South Dakota, Texas and Washington also include elements of the riparian doctrine in their water laws.

[27] For example, " '[b]eneficial use' includes but is not limited to use for domestic, municipal, recreation, wildlife, including fish, agricultural, mining, stockwatering and power purposes." ARIZ. REV. STAT. § 45-181(1) (2002). " 'Beneficial use' . . . means . . . a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreation uses . . . ." MONT. CODE ANN. § 85-2-102(2) (2002). Beneficial use is "the

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If the purpose of a water diversion were disposal of waste, such as mine drainage, there would be no end use of the water that benefits either the conveyor or society. Such waste disposal is contrary to state water law because there is no beneficial use, hence the proponent of the water transfer would not acquire the right to "use" the water.[28] Where the purpose of the diversion was to deliver water to another basin for irrigation and municipal use, however, farmers and city residents benefit from the use of the water, and the diversion/delivery would be recognized by state law.[29] In essence, the appropriation doctrine inherently does not allow the diversion of water for waste disposal purposes. Therefore, a deference to state law in this case would not lead to unregulated waste disposal.

The riparian doctrine of "reasonable use" is analogous to "beneficial use;" water may only be used for productive purposes and not for waste disposal. For example, in Florida,

> "[r]easonable-beneficial use" means the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.

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use of such water as may be necessary for some useful and beneficial purpose . . . ." *State ex rel. Erickson v. McLean*, 62 N.M. 264, 273, 308 P.2d 983, 988 (1957).

[28] *See, e.g., Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d 132, 429 P.2d 889 (1967) ("The use of waters as an agent to expose or to carry and deposit sand, gravel and rock, is as a matter of law unreasonable within the meaning of the constitutional amendment").

[29] *See, e.g., Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).

FLA. STAT. § 373.019(13) (2002).[30] As in a western prior appropriation state, to obtain a state permit to use water in Florida "the applicant must establish that the proposed use of water . . . [i]s a reasonable-beneficial use, . . . [w]ill not interfere with any presently existing legal use of water; and . . . [i]s consistent with the public interest." FLA. STAT. § 373.223(1) (2002). The analysis is the same under the Florida statute as it is in any western state; that is, if the purpose of the diversion is to dispose of waste, the diversion is not authorized by state water law.

A number of states can also apply a "public interest test" when evaluating a water right request so as to protect water quality. For example, in Idaho "if an applicant's appropriation of water 'will conflict with the local public interest' . . . then the Director 'may reject such application and refuse issuance of a permit therefor, . . . or may grant a permit upon conditions.'" *Shokal v. Dunn*, 109 Idaho 330, 336, 707 P.2d 441, 448 (1985). Similarly, Alaska "may not issue a permit unless doing so is in the public interest . . . consider[ing] the impacts of water appropriation on fish and game resources [and] public health . . . ." *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 950 (Alaska 1995). California's State Water Resources Control Board "has been granted broad authority to control and condition water use, insuring utilization consistent with the public interest . . . . The [board's] powers extend to

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[30] The New Hampshire Supreme Court similarly explained "a riparian owner has a right to the beneficial use of the water of a river or stream passing through or adjacent to his land . . . . An upstream riparian owner may divert water from its channel for any lawful use, so long as he returns it to the channel . . . in substantially the same condition as when it reached the upstream riparian owner's land." *Wisniewski v. Gemmill*, 123 N.H. 701, 465 A.2d 875 (1983).

regulation of water quality . . . ." *Envtl. Def. Fund, Inc. v. E. Bay Mun. Dist.*, 26 Cal.3d 183, 198, 605 P.2d 1, 9 (1980).

Reversal of the Eleventh Circuit decision would not lead to unregulated waste disposal practices as some may fear.

B. State "Water Quality Law" Appropriately Addresses the Water Quality Effects of Transbasin Diversions/Deliveries.

Two essential characteristics must be protected by state water laws for a water right to have meaning: first, the actual physical quantity of water must be available at the point of diversion and, second, the quality of the water must be adequate for the beneficial use. State laws accordingly protect both quantity and quality, through the common law, by statute, and through state water quality programs.[31]

[31] The construction of water diversion facilities, whether by headgate, dam, or a combination of both, most often occurs in waters regulated not only by state law but also by section 404 of the Clean Water Act, 33 U.S.C. § 1344. Review under section 404 also triggers the need for state reviews under section 401 of the Act. *Id.* at § 1341.

The Corps cannot issue a section 404 permit without a state section 401 certification that such activity will comply with, *inter alia*, applicable state water quality standards. 33 U.S.C. § 1341(a)(1); 33 C.F.R § 325.2(b), 330.4(c) (2002). Through section 401 certification, States (or the EPA Administrator where a state lacks authority to give the certification, 33 U.S.C. § 1341(a)) may accordingly address and prevent adverse water quality impacts that could otherwise result from these activities. For example, section 401(d) allows states to impose "other limitations" to assure compliance with state water quality standards and with "any other appropriate requirement of State law . . . ." *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 713-14 (1994). The Court has upheld such limitations on the construction and subsequent operation of a diversion based on state water quality

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The states' common law regards water pollution as a nuisance and, therefore, a trespass against the complainant's right to use water. The basic premise is that water quality cannot be impaired to an extent that would prevent subsequent uses. In Colorado, "a common law theory based on the prior appropriation doctrine . . . prohibits the discharge of contaminants into streams where doing so makes the water unsuitable for an[other] appropriator's normal use of water." *In re Concerning Application for Plan for Augmentation of the City and County of Denver*, 44 P.3d 1019, 1028 (Colo. 2002).

Other states reach similar results. *See, e.g., Phillips v. Davis Timber Co., Inc.*, 468 So. 2d 72, 79 (Miss. 1985) (plaintiff "entitled to an injunction enjoining and prohibiting further PCP pollution into his lake . . . ."); *Leo v. Gen. Elec. Co.*, 145 A.D.2d 291, 538 N.Y.S.2d 844, 846 (1989) (commercial fishermen have standing to sue for nuisance fishermen and obtain an injunction to prevent water pollution); *Dingwell v. Town of Litchfield*, 4 Conn. App. 621, 496 A.2d 213 (1985) (upholding injunction against town's pollution of well); *Penn. R.R. v. Sagamore Coal Co.*, 281 Pa. 233, 238, 126 A. 386, 387 (1924) (pollution of stream creates an enjoinable nuisance); *Sharp v. 251st St. Landfill, Inc.*, 925 P.2d 546, 556 (Okla. 1996) (permanent injunction against landfill that would pollute water). The states' ability to control water use need not be trampled upon, as would be true under the Eleventh Circuit opinion, in order to protect other water users from undue harm.

standards, including designated uses, water quality criteria, and antidegradation. *Id.* at 715-16, 719.

Some states have found it appropriate to enact state water quality provisions to protect users of water allocated under state law from injury. For example, Colorado law confers the power on each municipality "to enact all ordinances and regulations necessary" to protect municipal "water from pollution." COLO. REV. STAT. § 31-15-707(1)(b) (2002). Municipal jurisdiction extends "five miles above the point" in the stream or source from which water is taken. *Id.* This statute allows municipalities to protect the quality of their water supplies independent of the Clean Water Act.[32]

The Colorado Water Quality Control Act provides general authority to regulate any "activity" that causes "the quality of any state waters to be in violation of any applicable water quality standard." COLO. REV. STAT. § 25-8-205(1)(c) (2002). The Act also contains specific regulatory authority empowering the state to protect water quality through the adoption of control regulations, analogous to NPDES permits, for discharges from the "diversion, carriage, and exchange of water from or into streams, lakes, reservoirs or conveyance structures, or storage of water in or the release of water from lakes, reservoirs, or conveyance structures."[33] COLO. REV. STAT.

[32] The Town of Crested Butte, Colo., prohibits "[a]ll non-point and point sources of pollutants caused by or associated with land use activities in the Watershed District which will result in any measurable increase in pollution over existing water quality." Crested Butte, [Colo.], ¶ 145-10(B) (2003). *See also Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984).

[33] Control regulations may, for example, "describe precautionary measures, both mandatory and prohibitory, that must be taken by any person . . . [who] could reasonably be expected to cause pollution of any state waters . . . or . . . be in violation of any applicable water quality standard." COLO. REV. STAT. § 25-8-205(1)(c) (2002).

§ 25-8-503(5) (2002). The state may also adopt control regulations when necessary to assure compliance with water quality standards and classifications and "to protect present and future beneficial uses" of water. COLO. REV. STAT. § 25-8-202(7)(b)(II)(A) (2002).[34] This statutory authority allows the state to control the discharge of pollutants in situations analogous to *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1277 (CA1 1996) (transfer of water containing pollutants into "relatively pristine" pond), and *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155 (CA9 2003) (disposal of wastewater from production of coal bed methane), while simultaneously ensuring that water rights are not impaired. COLO. REV. STAT. § 25-8-104. Thus, state laws can and do appropriately address any water quality problems potentially associated with water conveyances, while respecting water allocations. In contrast, court-mandated NPDES permitting requirements would constitute wholesale interference with transbasin deliveries of water for beneficial use under state water law.

CONCLUSION

If water is the "life blood" of the West, then transbasin diversions/deliveries are surely the "arteries" that sustain the region's cities, towns, agriculture and industry. Such

[34] While conveyances are not subject to NPDES permitting, Colorado statute prohibits the discharge of any pollutant into a ditch or man-made conveyance for the purposes of evading NPDES permitting requirements. COLO. REV. STAT. § 25-8-101(1) (2002). Thus, a discharger could not evade permitting by discharging pollutants to a transbasin water conveyance rather than a stream.

transbasin diversions are no less important in other parts of the country, such as New York City and other eastern metropolitan areas. The Eleventh Circuit decision in *Miccosukee* runs roughshod over the states' management of their water resources. In marked contrast, the states are well suited to manage water quality impacts associated with transbasin diversions/deliveries under state law.

The decision must be reversed.

Respectfully submitted,

KEN SALAZAR, Attorney General*
ALAN J. GILBERT, Solicitor General
FELICITY HANNAY, Deputy Attorney General
ANTHONY S. TRUMBLY, Senior Assistant Attorney General
State of Colorado
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
(303) 866-3557
(303) 866-3558 (fax)

**Counsel of Record for all Amici*

PATRICIA A. MADRID, Attorney General
GLENN R. SMITH, Deputy Attorney General
STEPHEN R. FARRIS, Assistant Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6010
(505) 827-4440 (fax)

154D